Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-18

CALVIN EUGENE HUFFMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX TO CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Statement of Facts	3
Reasons for Granting the Writ	5
A. 18 U.S.C. § 922(a)(1) Is Unconstitutionally Vague	5
B. The Circuit Court Construed the Elements Required To Convict Under § 922(a)(1) Differently from the Instructions of the Trial Court and Erred in Not Remanding for a New Trial with Instructions Complying with Their Definition	12
C. The Evidence Is Insufficient To Convict the Defendant Beyond a Reasonable Doubt Because There Is No Evidence of Defendant's Participating in the Alleged Transaction Because of Profit or Profit Motives	15
Conclusion	20
Appendix	1a

TABLE OF CASES

	Page
Grayned v. *City of Rockford*, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972)	7, 8
Lanzetta v. *State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618 (1939)	11
Mullaney v. *Wilbur*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (June 9, 1975)	13
U.S. v. *Gross*, 451 F.2d 1355 (7th Cir., 1971)	8, 9, 10, 15
U.S. v. *Jackson*, 352 F. Supp. 672 (S.D. Ohio, 1972)	9, 11

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Calvin Eugene Huffman, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 5, 1975.

OPINION BELOW

The Opinion of the Court of Appeals below (Appendix, *infra*) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals below was entered on June 5, 1975 (Appendix). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A. Whether 18 U.S.C. § 922(a)(1) is unconstitutionally vague.

B. Whether the Circuit Court erred in not remanding for a new trial under its construction of the elements of 18 U.S.C. § 922(a)(1).

C. Whether the evidence is insufficient to convict the defendant beyond a reasonable doubt because there was no proof of profit or profit motive.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution.

Statutes

18 U.S.C. § 921(a)(11):

> The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, and (B) any person engaged in the business of repairing or making or fitting special barrels, stock or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

18 U.S.C. § 922(a)(1):

> Section 922. Unlawful acts.
>
> (a) It shall be unlawful—
>
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.

STATEMENT OF THE CASE

Petitioner Huffman was indicted at the June, 1974, Term of the Grand Jury for the Eastern District of Virginia sitting at Newport News, Virginia. The indictment charged him with one count of dealing in firearms in violation of Title 18, United States Code, Sections 922(a)(1) and 924(a). (A. 1).

Subsequently, trial was had before a jury, the Honorable Albert V. Bryan, Jr., District Judge, presiding, on July 23, 24, and 25, 1974. The jury returned a verdict of guilty. Judge Bryan imposed a sentence of two years on Huffman on August 30, 1974. (A. 2).

On appeal to the United States Court of Appeals for the Fourth Circuit, Petitioner's conviction and sentence was affirmed. (App. 1-3).[1]

STATEMENT OF FACTS

The bulk of the Government's case consisted of the testimony of three of Sgt. Huffman's fellow Marines that he participated in various transactions in firearms with them between April and December, 1973. The bulk of these transactions were purportedly with Sgt. Larry Kirkwood whom Huffman met in April of 1973, when Sgt. Huffman was in charge of the gunnery range at Quantico. Sgt. Kirkwood had been detailed to the gunnery range for annual marksmanship training. Sgt. Kirkwood testified that when he first met Sgt. Huffman, he went to Huffman's home and saw a large

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[1] App. is the Appendix of this Petition.

A. is the Appendix submitted on Appeal to the Circuit Court.

quantity of ammunition. Kirkwood testified that on April 29, 1973, he obtained 7 cans of ammunition from Sgt. Huffman and in return, gave Sgt. Huffman a .308 rifle which Kirkwood had obtained by trading 2 cans of the .45 ammunition to a dealer. According to Kirkwood, on September 6, 1973, he gave 3 .45 pistol frames to Sgt. Huffman to be built into complete pistols in return for a reel to reel recorder and picked up the pistols between 10 and 21 September 1973. On September 8, 1973, according to Kirkwood's testimony, he picked up approximately 16 cans of ammunition from Sgt. Huffman's house and subsequently purchased a .22 pistol which he delivered to Huffman in payment for the ammunition. (A. 3-9). Sgt. Kirkwood testified that on September 29, 1973, he picked up two more .45 pistol frames and delivered them to Sgt. Huffman to be built into complete pistols. He stated that he gave him a P-38 Walther automatic in payment for that service. Kirkwood further testified that he obtained ammunition on two more occasions in October of 1973, but did not testify as to any payment that was made for the ammunition on those occasions. (A. 34, 39-42).

Sgt. Huffman testified in his own behalf and denied that he had ever had a large quantity of ammunition stored at his house or that he sold such ammunition to Kirkwood. He testified as to the transactions involving firearms in which he participated with Kirkwood. The first transaction involved the P-38 pistol which Kirkwood testified that he had given Sgt. Huffman in payment for building weapons. Sgt. Huffman testified that Sgt. Kirkwood asked him to help sell the pistol and that he contacted Sgt. Mace and helped arrange the sale of the pistol for Kirkwood. He further testified that he obtained the .308 Remington rifle for Kirk-

wood to use in hunting season and he later sold this rifle to Sgt. Mace because he was not satisfied with the weapon. Sgt. Huffman also testified that he kept a number of empty ammunition cans in a shed behind his house in which he kept tools and other items. (A. 39-45).

Sgt. Mace testified that he did trade Sgt. Huffman two .45 receivers for a P-38 pistol which the Sgt. was trading for a third person. He also testified that he purchased in November and December of 1973, three rifles from Sgt. Huffman. He further testified that he sold one of the rifles to Cpl. Ross for exactly the same price that he had paid for the weapon. He further testified that he has only one of the weapons he purchased from Sgt. Huffman and that he sells weapons from time to time and does not see anything wrong with Sgt. Huffman's conduct in their dealings. (A. 15-21).

Lt. Ybarbo testified that in November of 1973, he purchased a 357 magnum pistol from Sgt. Huffman. He further testified that he never saw Sgt. Huffman selling any other weapons. The Lieutenant purchased the weapon when he saw Sgt. Huffman firing it at the firing range and asked him if he could purchase the weapon. Sgt. Huffman had purchased the weapon for $133.50 and sold the weapon plus a box of ammunition to Lt. Ybarbo for $130.00 in the same month in which it had been purchased. (A. 22-24, 45-47).

REASONS FOR GRANTING THE WRIT

A. 18 U.S.C. § 922(a)(1) Is Unconstitutionally Vague.

Sgt. Huffman was convicted of "dealing" in firearms in violation of 18 U.S.C. § 922(a)(1). Nowhere

in Section 922 or any place else in the Code is the term "dealing" defined. This argument will show that the statute is so vague that Sgt. Huffman or any defendant acting in a similar manner was not informed what conduct would render them liable to the penalties imposed for violation of Section 922 and that Section allows arbitrary and discriminatory enforcement.

18 U.S.C. § 922(a)(1) reads as follows:

> Section 922. Unlawful acts.
>
> (a) It shall be unlawful—
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;

18 U.S.C. § 921(a)(11) defines "dealer" as follows:

> The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, and (B) any person engaged in the business of repairing or making or fitting special barrels, stock or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

The phrase applicable in the present case is whether or not the defendant was "in the business of dealing in firearms or ammunition". The statute does not further define this vague and ambiguous phrase by defining specific amounts of sales necessary to be dealing or in any way particularly describing the course of conduct which constitutes dealing in firearms.

The principles governing whether a statute or ordinance is vague have been stated many times and were recently restated in *Grayned* v. *City of Rockford,* 408 U.S. 104, 33 L.Ed.2d 222, 92 Sup. Ct. 2294, which states at page 108:

> It is a basic principle in due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trip the innocent by not providing fair warning. Second, if an arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

The present statute does not give the person of ordinary intelligence a reasonable opportunity to know what is prohibited. There are many questions not answered by the standard laid down by the applicable statute, such as: the amount of firearms or ammunition one must sell to be "dealing", the amount of time over which the transactions must take place, the permissibility of disposing of guns or ammunition one owned prior to the passage of this law, whether or not one can use one's connections or acquaintances to obtain a firearm or have one built or repaired for another friend or acquaintance. It would seem evident that any law that leaves these many questions unanswered does not give

a person of ordinary intelligence a reasonable opportunity to know what it prohibited.

The extent to which the present law delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* basis is shown within existing precedent concerning this law and the record of this case. Sgt. Mace was called as a witness for the prosecution and testified that he had purchased or traded for three weapons which he obtained from Sgt. Huffman. He testified that he traded two 45 receivers for one weapon and paid cash for the other weapons. On cross-examination he testified that he had resold two of the three weapons which he procured from Sgt. Huffman and that he bought and sold other weapons from time to time. (A. 15-20).

By his own testimony Sgt. Mace has been involved in several weapons' transactions, but he has not been prosecuted as a "dealer". Apparently Sgt. Mace is on one side of whatever imaginary line the U.S. Attorney has drawn in the prosecution of these cases, but Sgt. Huffman falls on the other side of the line and is thought to be a "dealer". Sgt. Huffman had no way of knowing what the U.S. Attorney's criteria was to determine what constitutes dealing, and any such criteria is arbitrary, discriminatory and vague as defined by *Grayned, supra.*

The vagueness of the statute is further shown by the fact that the Court in the present case and other Courts have adopted totally different approaches toward defining when one is "in the business of dealing in firearms". *U.S.* v. *Gross,* 451 F.2d 1355 (7th Circ. 1971), involved a prosecution under 18 U.S.C. § 922 (a)(1) as does the present case. The Court defined

the conduct prohibited by the statute at page 1357: "There appears to be little doubt that 'dealer' means anyone who is engaged in any business of selling firearms, and that 'business' is that which occupies time, attention and labor for the purpose of livelihood or profit. This was the definition adopted by the Fourth Circuit on Appeal of the instant case. (App. 2)

In *U.S.* v. *Jackson,* 352 F. Supp. 672 (S.D. Ohio 1972), the Court also was dealing with a case brought under 18 U.S.C. § 922(a)(1). The Court rejected the definition given in *U.S.* v. *Gross, supra,* and adopted its own definition at p. 674, as follows: "We conclude that anyone is engaged in the business of dealing in firearms if they have guns on hand or are ready and able to procure them, and either case for the purpose of selling some of them to such persons as they might from time to time conclude to accept as customers."

The trial Court in the present case instructed the jury as follows, regarding the question of whether or not the defendant was engaged in the business of dealing in firearms or ammunition:

> In deciding whether the defendant was engaged in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling.
>
> First, the number and type of firearms and quantities of ammunition that were owned, purchased, or sold by the defendant; the number of firearms 'built up' or assembled by the defendant, or caused to be built up or assembled by him;
>
> Whether the defendant made a profit from any sale or transaction involving firearms or ammunition;

The frequency of these transactions;

The purpose for which the firearms or ammunition was owned or possessed by the defendant;

The extent to which the defendant devoted time, attention, and effort to the endeavor of selling firearms or ammunition or repairing or assembling guns.

A person who collects firearms for his own use or enjoyment and toward that purchase [sic] occasionally buys or sells a gun is not dealing in firearms within the meaning of the law.

Of course, he is not charged just with dealing in firearms. He is charged with dealing in ammunition.

It is not necessary for the Government to prove any specific number of transactions. A person can be a small dealer as well as a large dealer. Nor is it necessary that any actual profit be shown by the Government.

It need not be his only business, but the test is: was any selling of firearms or ammunition or building up of firearms a business as distinguished from a hobby?

To be a sale, of course, the transfer of ammunition or commodity need not be for cash. It can be for a commodity.

If, for example, as contended by the Government, the ammunition was transferred by the defendant in exchange for a commodity such as another gun this would constitute a sale. (A. 62-65).

It can be readily seen that these three Courts have taken totally different approaches in interpreting § 922 (a)(1). The definition in *U.S.* v. *Gross, supra,* requires that a defendant devote time and labor to the sale of the weapons with the purpose of obtaining a profit.

The Court in *U.S.* v. *Jackson, supra,* requires the defendant have guns or access to them and be willing to sell them.

The thrust of the trial Court's instructions in the present case is that what constitutes "business of dealing in firearms" depends entirely upon the circumstances. It is not necessary that a profit be made, profit motive be present or for the Government to prove any specific number of transactions. It appears to be a crime with a number of elements, no one of which is necessary for conviction and no particular combination thereof is necessary for conviction.

The learned and able trial Judge in the present case and in the cases cited could not reach a common definition as to what constitutes "business of dealing in firearms". The statute is clearly vague and allows Courts and juries to be arbitrary and discriminatory. The Courts involved could not define the conduct prohibited by the statute. How was Sgt. Huffman to know prohibited conduct?

The term "business of dealing in firearms or ammunition" is even more vague than the term "gangster" that was found unconstitutionally vague in *Lanzetta* v. *State of New Jersey,* 306 U.S. 451, 59 Sup. Ct. 618 (1939). The word "gangster" is a more specific and limited word than the word "business". Like the statute involved in *Lanzetta,* the present statute is unconstitutionally vague.

B. The Circuit Court Construed the Elements Required To Convict Under § 922(a)(1) Differently from the Instructions of the Trial Court and Erred in Not Remanding for a New Trial with Instructions Complying with Their Definition.

The Circuit Court defined the offense as follows:

> There appears to be little doubt that "dealer" means anyone who is engaged in *any* business of selling firearms, and that "business" is that which occupies time, attention and labor for the purpose of livelihood or profit.—Citations omitted.—Thus, while the Government need not prove an actual profit from the sales of firearms, it must show a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by hobbyists. (App. 2).

The trial Court instructed the jury as follows:

> In deciding whether the defendant was in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling.
>
> First, the number and type of firearms and quantities of ammunition that were owned, purchased, or sold by the defendant; the number of firearms "built up" or assembled by the defendant, or caused to be built up or assembled by him;
>
> Whether the defendant made a profit from any sale or transaction involving firearms or ammunition;
>
> The frequency of those transactions;
>
> The purpose for which the firearms or ammunition was owned or possessed by the defendant;
>
> The extent to which the defendant devoted time, attention, and effort to the endeavor of selling

> firearms or ammunition or repairing or assembling guns.
>
> A person who collects firearms for his own use or enjoyment and toward that purchase occasionally buys or sells a gun is not dealing in firearms within the meaning of the law.
>
> Of course, he is not charged just with dealing in firearms. He is charged with dealing in ammunition.
>
> It is not necessary for the government to prove any specific number of transactions. A person can be a small dealer as well as a large dealer. Nor is it necessary that any actual profit be shown by the government.
>
> It need not be his only business, but the test is: Was any selling of firearms or ammunition or building up a firearms a business as distinguished from a hobby?
>
> To be a sale, of course, the transfer of ammunition or firearm need not be for cash. It can be for a commodity.
>
> If, for example, as contended by the government, the ammunition was transferred by the defendant in exchange for a commodity such as another gun, this would constitute a sale. (A. 63-65).

The Circuit Court below established three elements for being in the "business" of dealing in firearms; "a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist". It is basic in our law that all elements of a crime must be proved beyond a reasonable doubt by the Government. See *Mullaney* v. *Wilbur,* — U.S. —, — S.Ct. —, — L.Ed.2d — (June 9, 1975).

The trial Court's instructions clearly state that the jury may consider whether or not the defendant made

a profit in deciding whether or not he was in the "business" of dealing in firearms. The trial Court instructed that this was one element among many that the jury could consider in making that decision. As far as it goes, the trial Court's instructions are not objectionable. However, the Circuit Court has clearly defined three elements which must be found beyond a reasonable doubt in order to convict the defendant of the instant offense and these elements are not included in the trial Court's instructions. Nowhere in the trial Court's instructions is the jury told that it must find beyond a reasonable doubt that the defendant must have engaged in the alleged transactions with a profit motive, a willingness to deal and a greater degree of activity than occasional sales by a hobbyist.

The trial Court's instructions are as vague as the basic statute and set forth no elements whatsoever for the offense proscribed by 18 U.S.C. § 922(a)(1). The Circuit Court said that under its construction, "the statute is not vague as applied to Huffman". (App. 3). Assuming that under the Circuit Court's construction, the statute is not vague as applied to Sgt. Huffman, he is entitled to be tried under that construction and not the vague standard set by the statute and the trial Court's instructions. If the Circuit Court has correctly construed the statute, the case must be remanded to the District Court to allow the jury to decide beyond a reasonable doubt whether Sgt. Huffman participated in the alleged transactions with a profit motive, a willingness to deal and a greater degree of activity than occasional sales by a hobbyist.

The Circuit Court erred when it did not remand this case to the District Court for a new trial under proper

instructions according to their construction of the crime proscribed in § 922(a)(1).

C. The Evidence Is Insufficient To Convict the Defendant Beyond a Reasonable Doubt Because There Is No Evidence of Defendant's Participating in the Alleged Transaction Because of Profit or Profit Motives.

The term "business of dealing in firearms or ammunition" as used in § 922(a)(1) as indicated in Part A of this brief is unconstitutionally vague, but if it has a definable meaning, it requires that the defendant participate in transactions involving firearms and ammunition with the motive of obtaining a profit.

In the case of *U.S.* v. *Gross,* 451 F.2d 1355 (7th Cir. 1971), the Court construed § 922(a)(1) defining "dealer and business" as follows:

> There appears to be little doubt that "dealer" means anyone who is engaged in any business of selling firearms, and that "business" is that which occupies time, attention and labor for the purpose of livelihood or profit.

In that case, the Court upheld the conviction of the defendant for dealing in firearms in violation of § 922(a)(1) applying the above definition. At page 1357 of the opinion, the Court noted that six of the firearms purchased by the undercover police agent from the defendant had previously been purchased by the defendant from a licensed firearm dealer and that the prices the defendant charged the officer were considerably in excess of the market value of those guns. This evidence gave the Court clear proof that the defendant in that case was making a profit from his transactions. The *Gross* case is clear authority that in order to convict Sgt. Huffman of the instant offense,

the Government had to prove that the transactions in which he participated were profit-making.

The Circuit Court below adopted the *Gross* definition of "dealer" and "business". It went on to more fully delineate the elements of the offense as follows:

> Thus, while the Government need not show an actual profit from sales of firearms, it must show a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by hobbyists. (App. 2)

Clearly, the Circuit Court opinion requires a showing of beyond a reasonable doubt that the defendant participated in the alleged transactions for a profit motive.

The Government's evidence would indicate Sgt. Huffman participated in 13 separate transactions in which guns, rebuilt guns or ammunition possessed by him were transferred to another party. In all these transactions, the transferee was a fellow Marine. The majority of these transactions concerned a Sgt. Larry Kirkwood who met Sgt. Huffman in April of 1973. The first alleged transaction between Sgt. Huffman and Sgt. Kirkwood occurred on August 29, 1973. The majority of the alleged transactions were trades for other guns, and in one instance, a tape recorder, rather than cash transactions. (A. 3-24).

Sgt. Huffman took the stand and denied participating in many of the 13 transactions, but at this stage, the conflict in testimony is resolved in favor of the Government. (A. 31-54).

Even taking the Government's evidence at its highest point there is no evidence that Sgt. Huffman was participating in the transactions to make a profit. To the

contrary, the evidence of the Government clearly indicates that Sgt. Huffman was not making a profit in the transactions in which he allegedly participated.

According to the Government's case, the first transaction in which Sgt. Huffman was involved was on August 29, 1973. Larry Kirkwood testified that on that date, he was given 4 cans of .45 ammunition and 3 cans of .308 ammunition by Sgt. Huffman. He further testified that in return for this ammunition he gave Sgt. Huffman a .308 rifle which he had obtained by trading a dealer 2 cans of the same ammunition. The Government introduced no evidence to show the value of the ammunition, the value of the rifle, the price paid for the ammunition, the price paid for the rifle, or the source from which Sgt. Huffman obtained the ammunition. The only legitimate inference to be drawn from the Government's own evidence is that Sgt. Huffman exchanged 7 cans of ammunition for a rifle which was worth 2 cans of ammunition to a dealer and the only profit was made by the other parties to the transactions. (A. 6, 6A).

The Government's witness Kirkwood also testified that in the first part of October, he obtained 8 cans of ammunition from Sgt. Huffman. Neither the witness Kirkwood nor any other Government witness testified that anything had been exchanged for its 8 cans of ammunition. Sgt. Huffman could not have made a profit on this transaction becaust he obtained nothing in return for the ammunition. (A. 12).

Similarly, the Government's witness Kirkwood testified that in the latter part of October, he obtained 6 cans of ammunition and assorted shot-gun shells from Sgt. Huffman. In this transaction, there was no testi-

mony that Sgt. Huffman received anything in return for the ammunition. (A. 13).

The Government's witness, Sgt. Mace, testified that he purchased a Parker Ballard rifle from Sgt. Huffman for $200.00 and sold it on the same day that he purchased it for the same price. There is no evidence as to what Sgt. Huffman paid for the rifle or as to the market value of the rifle other than the sale price. (A. 20, 21).

Lt. Ybarbo testified for the Government that he purchased a 357 magnum from Sgt. Huffman. (A. 23). Sgt. Huffman testified, uncontradicted by any evidence presented by the Government, that he sold the magnum pistol to Lt. Ybarbo because he could not afford the ammunition for the pistol. He sold the pistol and a box of ammunition for $130.00 in the same month he had purchased the pistol for $129.00 plus $4.50 tax. (A. 44, 46).

The Government's own evidence shows that in five out of the thirteen transactions, Sgt. Huffman received no profit on transferring a gun or ammunition. The evidence shows that in the two October ammunition transfers, he received nothing at all in return for the ammunition. The evidence shows that as to the ammunition allegedly transferred to Kirkwood on August 29, 1973, the defendant received a gun worth two cans of ammunition in return for seven cans of ammunition. The evidence shows that the rifle for which Sgt. Mace paid $200.00, he immediately resold for $200.00 indicating the market value of the weapon to be $200.00. There is no proof that Sgt. Huffman paid any less than the market value of the rifle for it. The evidence shows that the 357 magnum pistol purchased by Lt. Ybarbo

was sold to him by Sgt. Huffman and for slightly less than the amount Sgt. Huffman had paid for the same pistol the same month he sold it to the Lieutenant. The only clear inference that can be drawn from these facts is that Sgt. Huffman was not making a profit in the transactions alleged by the Government.

There is no proof that Sgt. Huffman made a profit in the other transactions testified to by the Government's witnesses. No proof was introduced by the Government to show that Sgt. Huffman received cash or items in exchange which exceeded the market value or purchase price of the item allegedly transferred by Sgt. Huffman. All the alleged transactions were with fellow Marines.

The Circuit Court opinion below and *Gross, supra,* require a showing of profit or profit motive before a defendant can be convicted under § 922(a)(1). All the transactions shown by the Government's evidence were with fellow Marines. The Government's own evidence in this case clearly shows that there was no profit made in a number of instances. The Government did not prove Sgt. Huffman made a profit in any instance. The only reasonable inference that can be drawn is that Sgt. Huffman was not in the "business" of dealing in firearms as that term is defined in *Gross, supra,* and by the Circuit Court below. Clearly, the Government did not prove beyond a reasonable doubt that Sgt. Huffman was "dealing" in firearms.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted for the reasons set forth above.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2185

UNITED STATES OF AMERICA, *Appellee,*

v.

CALVIN EUGENE HUFFMAN, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued March 3, 1975 Decided June 5, 1975

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and HALL, District Judge

---

Jack S. Rhoades (Howard, Stevens, Lynch, Cake and Howard on brief) for Appellant; John F. Kane, Assistant United States Attorney, (David H. Hopkins, United States Attorney, and Frederick Sinclair, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

Calvin Eugene Huffman was convicted by a jury of engaging in the business of dealing in firearms without being licensed to do so, a violation of 18 U.S.C.A. § 922(a)(1) and § 924(a). We conclude that Huffman's claims on appeal are without merit and affirm.

Huffman contends that Section 922(a)(1) is void for vagueness and that the evidence is insufficient to support his conviction. The statute proscribes dealing in firearms without a license. A dealer is "any person engaged in the business of selling firearms or ammunition at wholesale or retail . . . ." 18 U.S.C.A. § 921(a)(11). "There appears to be little doubt that 'dealer' means anyone who is engaged in *any* business of selling firearms, and that 'business' is that which occupies time, attention and labor for the purpose of livelihood or profit." *United States* v. *Gross*, 451 F.2d 1355, 1357 (7th Cir. 1971) (emphasis in original); *United States* v. *Wilkering*, 485 F.2d 234, 235 (8th Cir. 1973); *United States* v. *Day*, 476 F.2d 562, 567 (6th Cir. 1973). Thus, while the Government need not prove an actual profit from sales of firearms, it must show a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist.

So construed, the statute is not vague as applied to Huffman. The Government proved that he engaged in more than a dozen transactions in the course of a few months. He frequently built firearms, or had them rebuilt, and exchanged them for other weapons which he subsequently sold or traded. There was also evidence that he traded large quantities of military ammunition for firearms. The jury was properly instructed to distinguish between a business and a hobby and to consider whether a profit was made. Accordingly, Huffman's conviction under the statute is not lacking in fairness, nor is it unsupported by the evidence.

Similarly without merit is Huffman's claim that the district court erred in refusing to instruct the jury that criminal intent is an essential element of the offense.

> "There is no constitutional requirement that scienter be established as an element of the crime, nor will Congress be presumed from silence to have intended to make it so when the purpose of the statute is to regulate objects or activities which in and of themselves are dangerous or harmful." *United States* v. *Ruisi*, 460 F.2d 153, 156 (2d Cir. 1972).

In this respect Huffman's contention, as Ruisi's, is that he was entitled to acquittal unless he knew his activity was unlawful and had an affirmative intention to violate the statute. Of course, he was entitled to no such instruction in this prosecution for violation of a statute regulating "activities which in and of themselves are dangerous or harmful."